88-690

Supreme Court, U.S.
FILED
OCT 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MATSON PLASTERING, INC., a California Corporation,
Petitioner,

vs.

PLASTERERS AND SHOPHANDS LOCAL NO. 66,
O.P. & C.M.I.A., an unincorporated association,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE NOVEL QUESTION PRESENTED FOR REVIEW

Under Section 303 of the Labor-Management Relations Act, does a Construction Subcontractor *waive* his right to recover damages from a Union for illegal picketing *merely because* the illegal picketing was so coercive that it caused the Subcontractor under duress to sign a Collective Bargaining Agreement with that illegally picketing Union?

In other words, does a federal court lose its primary jurisdiction under Section 303 to award to an illegally picketed Construction Subcontractor any damages whatsoever from the Union which picketed illegally, merely because the illegal picketing caused so much duress and coercion that the Construction Subcontractor, under protest and with a reservation of all rights, signed a Collective Bargaining Agreement with that Union?

Stated yet another way, under Section 303 can a Construction Subcontract recover as compensatory damages from a Union an amount of money equivalent to the excess or extra wages and benefits he paid to his workers and to the Union under a Collective Bargaining Agreement which was entered into as a direct and proximate result of the duress and coercion of secondary boycott picketing which picketing is prohibited by Section 8(b)(4)?

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I

OPINION BELOW

The decision of the Ninth Circuit Court of Appeals (finding Congress intended that federal courts should only have jurisdiction under Section 303 to award damages to Construction Subcontractor Matson against a Union for illegal picketing before, and not after, a coerced Collective Bargaining Agreement is executed) is attached hereto as Appendix "A". The underlying Northern California District Court's decision (granting Summary Judgment dismissing Construction Subcontractor Matson's Section 303 complaint against the Union for rescission of the coerced Collective Bargaining Agreement as well as damages for illegal picketing), as sustained by the Ninth Circuit, is also attached as Appendix "B". And the transcript of the summary judgment oral arguments before the Northern California District Court is attached as Appendix "C".

II

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, Appendix "A", on which review is sought, was dated and entered on July 27, 1988.

The jurisdiction of this Honorable Court is timely invoked under Section 1254(a) of Title 28 of the United States Code.

III

FEDERAL STATUTES INVOLVED

The Federal Statues involved include Section 303 of the Labor-Management Relations Act, [29 U.S.C. § 187] attached hereto as Appendix "D"; and Section 8(b)(4) of the Labor-Management Relations Act, [29 U.S.C. § 158(b)(4)] attached hereto as Appendix "E".

IV

STATEMENT OF THE CASE

A. Procedural Background

Construction subcontracting firm, Matson Plastering Company, Inc., ("Matson") appealed to the Ninth Circuit Court of Appeals the District Court's grant of Summary Judgment in favor of the Plasterers and Shophands Local No. 66 ("Local Union 66" or "Union").

Matson had filed a Complaint for Damages against Local Union 66 with the District Court under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187. Within said Complaint for Damages, Construction Subcontractor Matson alleged that it had been compelled to sign a Collective Bargaining Agreement as the direct and proximate result of Local Union 66's illegal secondary picketing of neutral construction site gates, which illegal picketing had thereby shut down the entire construction site in violation of Section 8(b)(4) of the Labor-Manage-

ment Relations Act, 29 U.S.C. 158(b)(4). Thus, Matson's Complaint for Damages asked:

> *First*, that the District Court *rescind* the Collective Bargaining Agreement under the equitable principal of *rescission*, since the contract was the direct result of illegal duress and coercion; and
>
> *Second*, that the District Court grant Matson *compensatory* damages in the form of monetary *restitution* from Local Union 66 for the excess or extra wages and benefits which Matson had paid to his workers and to Local Union 66 under the terms of the Collective Bargaining Agreement; and
>
> *Third*, that the District Court grant Matson compensatory damages for any *other non-speculative* damages that were sustained by Matson as the direct and proximate result of Local Union 66's illegal picketing.

Local Union 66 responded to said Complaint for Damages by filing a Motion for Summary Judgment. Therein, Local Union 66 argued that *even if* the picketing was illegal, nevertheless, Matson allegedly waived his right to sue by Matson's act of having signed the Collective Bargaining Agreement (even though Matson signed it under protest). In other words, the Union argued that, when faced with assumed illegal picketing, an employer may not mitigate his damages by signing the Collective Bargaining Agreement under protest and then return to work and sue for Section 303 for damages.

The District Court heard oral arguments on the Union's Motion for Summary Judgment on May 8, 1987. See the transcript at Appendix "C." During the Hearing, *regarding the issue of whether any monetary damages* were recoverable, District Court Judge Schwarzer stated as follows:

> "... Well, the ruling will speak for itself. It will simply say that you cannot recover, assuming there was illegal secondary picketing, you cannot recover those losses which you suffered as a result of entering into a Collective Bargaining Agreement. That's what I am saying.

> "Because I do not think, as a matter of national policy, a federal court should permit that measure of damages. That's all that I am saying.
>
> "So I am assuming, yes, that there was illegal picketing, for purposes of the ruling."

Next, at the hearing, Judge Schwarzer was asked whether he would nevertheless allow the Complaint to stand *with respect to the request to rescind the Collective Bargaining Agreement*, even though he'd indicated an intent to strike the Complaint's request for damages. Judge Schwarzer responded as follows:

> "... I am ruling the same way on that. I am not—I am rejecting—any relief.
>
> "You know, you'd have a right to get rescission if you proved that your man entered the contract [Collective Bargaining Agreement] because the union organizer had a gun against his head, or something like that, traditional coercion.
>
> "But short of traditional coercion, I would not—I would not entertain that relief."

Thereafter, Judge Schwarzer issued his confirming written Order (attached as Appendix "B"), which Matson appealed to the Ninth Circuit.

The Ninth Circuit's Decision, attached as Appendix "A", which Matson now asks this Honorable Court to review, sustained Judge Schwarzer's aforementioned Summary Judgment denying Matson any relief for the illegal picketing. Matson now seeks the Supreme Court's review because Matson feels the Ninth Circuit not only misunderstood certain facts, but misunderstood the Congressional Policy underlying Section 303's grant of jurisdiction to our country's Federal District Courts. Matson believes that by enacting Section 303, Congress intended to grant our Federal Courts jurisdiction to award damages to employers who have suffered from effects of illegal picketing prohibited by Section 8(b)(4). Matson also believes that Congress also conveyed to our Federal Courts the authority to equitably rescind collective bargaining agreements signed as the result of coercive illegal picketing.

The Ninth Circuit's mistakes are summarized below:

FIRST MISTAKE. The Ninth Circuit apparently misunderstood the underlying record when it stated that PCCI (the contractor which hired Subcontractor Matson) had various PCCI-Union labor agreements requiring PCCI to hire only Union subcontractors, but that Matson was non-Union. In reality, the record is uncontested that Matson's subcontracting agreement with PCCI did *not* require Matson to sign a Collective Bargaining Agreement with Local Union 66. Whether or not PCCI was itself signatory to a Local Union 66 agreement, and if so, whether PCCI violated that agreement by knowingly subcontracting to Matson who was not signatory with Local 66, is an irrelevant subject which was not addressed by any party in the underlying record.

SECOND MISTAKE. The Ninth Circuit, particularly in oral arguments, apparently acknowledged that, in a normal type of commercial contract dispute case, such as in a diversity jurisdiction situation, Federal Courts often grant the equitable remedy of contractual *rescission and restitution* so as to place the party who suffered the duress, coercion or other illegal conduct back into a position of pre-contract status quo.[1] However, the Ninth Circuit illogically interpreted Section 303 to statutorily prohibit Federal Courts from awarding equitable remedies when the contract involved is a Collective Bargaining Agreement rather than a commercial contract. Thus, without consideration of obvious Congressional intent to punish illegally picketing unions, the Ninth Circuit simply read Section 303's affirmative state-

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[1] See *Continental Airlines v. Goodyear Tire and McDonnell Douglas* (9th Cir. 1987) 819 F.2d 1519; *Pacific Telephone v. MCI Telecommunications and American Telephone* (9th Cir. 1981) 649 F.2d 1315; *Sheehan v. Atlanta International Insurance* (9th Cir. 1987) 812 F.2d 465; *Jamestown Farmers Elevator v. General Mills* (8th Cir. 1977) 552 F.2d 1285; *Chouinard v. Chouinard* (5th Cir. 1978) 568 F.2d 430; *Palmer Barge Lines v. Southern Petroleum* (5th Cir. 1985) 776 F.2d 502; *Union Pacific Rail Co. v. Public Service Commission of Missouri* (U.S. Sup.Ct.; 1918) 248 U.S. 67, 39 S.Ct. 24.

ment that an illegally picketed employer . . . "shall recover the damages by him sustained . . ." to illogically infer a negative implication, namely that Federal Courts may not grant equitable relief to undo signed collective bargaining agreement.[2]

Matson believes the Ninth Circuit has misinterpreted Section 303. Certainly Congress' grant of jurisdiction to give relief against illegally picketing unions was not so narrow as to distinguish between legal and equitable monetary remedies. Under the Ninth Circuit's rationale, no matter how violently illegal the picketing was, even if the Union held a gun to Matson's head, still the Court would not have Section 303 jurisdiction to give rescission of contract procured by such duress. Certainly Congress did not intend such an unfair result.

THIRD MISTAKE. Then, apparently recognizing that its refusal to even consider the equitable remedy of rescission was very harsh, particularly since the Trial Judge had assumed the picketing was illegal and coercive, the Ninth Circuit made a quick side comment that allegedly Matson could have avoided this harsh result by securing NLRB help. The Ninth Circuit claims that Matson could have timely filed a Section 8(b)(4) unfair labor practice charge with the NLRB, and Matson could have then asked the NLRB to enjoin the Union's illegal secondary picketing under Section 10(j), 29 U.S.C. 160(j). But here, the Ninth Circuit misses the point completely.

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[2] The Ninth Circuit quickly and without much analysis so concluded when in its Decision (Appendix "A") it quoted Section 303 and then stated: ". . . Matson contends it is entitled to rescission of the Collective Bargaining Agreement under Section 303 because it signed the agreement under duress . . . The problem with Matson's position is that it seeks equitable relief to undo the contract it signed, but Section 303's remedies are limited to damages . . . Because Section 303 clearly limits relief to damages, the district court properly rejected Matson's request for rescission. . . ."

Under the facts of this case, the General Contractor had been threatened by Local Union 66 that it would shut the entire job down unless the General Contractor *either* (i) fired Matson, or (ii) forced Matson to sign Local Union 66's collective bargaining agreement and then replace his workers with Local 66 men. The General Contractor was desperate to get the roof put on the building and the General Contractor was facing huge late charges from the owner of the project. Thus, on the same day that the General Contractor's job site was illegally picketed and shut down by Local 66, the General Contractor kicked Matson off the job. Matson was fired. Matson's only hope for reinstatement was if he signed up with the Union and got the Union to pull its pickets in one or two days before the General Contractor hired a replacement for Matson.

Had Matson filed an unfair labor practice charge, the NLRB could only enjoin the Union's future illegal picketing at neutral gates. The past threat to the General Contractor had *already* caused Matson to be fired. The NLRB does not have jurisdiction to enjoin the Union-fearful General Contractor so as to order the General Contractor to rehire Matson.

In other words, had Matson filed a ULP charge, no matter how rapidly the NLRB might have considered applying to a District Court for an order enjoining the Union, Matson would have remained fired by the General Contractor.

The U.S. Supreme Court has always recognized this distinction between the NLRB injunction remedy and the District Court Section 303 damages suit remedy. Thus, the U.S. Supreme Court has consistently held, since the year 1952, that an employer such as Matson, suffering illegal secondary picketing activity, may pursue a damages suit under Section 303 against the Union without first filing an 8(b)(4) ULP charge with the NLRB and asking the NLRB to seek a Section 10(j) injunction. A Section 303 suit may be brought regardless of whether any unfair labor practice charges are filed with the NLRB. The two procedures are independent of one another. See, the landmark U.S. Su-

preme Court Decision of *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.* (1952) 342 U.S. 237, 72 S.Ct. 235, 29 LRRM 2249.

FOURTH MISTAKE. The Ninth Circuit quickly disposed of Matson's request for monetary compensation in an amount equal to the excess or extra wages and benefits Matson paid under the illegally coerced Collective Bargaining Agreement. First, the Ninth Circuit said that it could not award the excess wages and benefits as damages unless it could first rescind the Collective Bargaining Agreement. Next, it said Section 303 did not allow the equitable remedy of rescission of contract (as discussed above). Then, since the parties stipulated during the oral argument that this was a novel case with novel issues, the Ninth Circuit not surprisingly said no other Section 303 case had ever awarded excess wage damages. And finally, the Ninth Circuit simply made a conclusionary statement that Section 303's language and legislative history did not allow contract rescission so therefore no damages including excess wages could ever be awarded since the contract could not be first struck down by rescission.

B. Background Facts

In July, 1985, Matson was notified by People's Construction Company, Inc., ("PCCI") that Matson would be working for PCCI on a construction project in Foster City, California. PCCI mailed Matson a proposed subcontract. Mr. Ken Matson, the President of Matson, by an August 1985 letter, told PCCI that sections of the sub-contract were unacceptable including one titled "Labor Relations", which if it had been executed would have required Matson to agree to abide by some union contracts but not Local Union 66's contract.

Thus with the understanding that Matson was not signatory to any union contracts in the Foster City area, PCCI nevertheless hired Matson and Matson commenced work on the project in mid-September. In mid-October the Union appeared on the scene. A Local 66 Union business agent telephoned Ken Matson and threatened to shut down the entire project unless Matson

signed a collective bargaining agreement with Local Union 66. Ken Matson immediately notified the General Contractor of this threat and requested that a reserve gate system for Matson's sole and exclusive use be set up. Matson informed the Union of this fact.

A few days later, the same Union business agent told PCCI that pickets would be placed at all of the project's entrances (i.e., at neutral gates) and the job would be shut down unless Matson was fired and thrown off the job site. That day, as the Union requested, PCCI didn't allow Matson to enter onto the job site.[3]

Later that same day, Matson's name was added to a non-union separate gate. The Union was notified of this fact.

Nonetheless, the following day, the Union picketed all of the jobsite's gates, including the separate union sub-contractors neutral gates. The Union representative made it clear to PCCI that the Union would continue to picket all of the job gates if any of Matson's employees were permitted to even enter onto the project before Matson signed a Collective Bargaining Agreement. Therefore, PCCI again ejected Matson and gave Matson a letter confirming this fact. Further, PCCI then told Matson that because of the Union's threat, Matson was fired so that he would not be allowed back on the job site, unless Matson signed a Collective Bargaining Agreement with Local 66. An important factor in PCCI's decision was the fact that there was only three to four days left to get the roof completed and if the union roofers refused to cross the picket lines at their neutral gate, then PCCI would be left in a desperate situation.

Matson had few choices. On the one hand, Matson could remain locked out and fired and sue Local 66 for hundreds of thousands of dollars in Section 303 damages. Instead, Matson attempted to mitigate the damages that Local 66's illegal activity had caused him to sustain.

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[3] First, the General Contractor ordered Matson off the job, but rescinded the order only after instructing PCCI to reissue the order to Matson to remove itself from the site.

Therefore that *same day* Matson signed with Local 66 under protest. Matson met with the Union in order to sign a one-job contract, not a three year collective bargaining agreement. The Union business representative said that if Matson tried this the Union would shut the job down forever. Ken Matson then signed a three year Collective Bargaining Agreement writing on the contract that he was signing it under protest. This was not acceptable to the Union business agent who wanted the written protest removed. So Ken Matson signed a second copy of a three year Collective Bargaining Agreement but again repeatedly stated orally that he was doing so under protest, as a result of duress, and with a reservation of all his rights to sue for damages.

As a result of signing this Collective Bargaining Agreement, Matson was required to pay approximately $20.00 more in wages and union benefits per each man hour than he would have had to pay if he had not signed the Agreement. Plus, the productivity of the workers sent by the Union was substantially below that which Matson had expected from his own men which he had previously been using. This also resulted in the payment of more excessive wages than anticipated.

C. Section 8(f) Pre-Hire Collective Bargaining Agreements Are Normally Disfavored By The Courts

The parties agreed at oral argument before the Honorable Ninth Circuit that this is a matter of first impression. Matson submits that the legislative history of Section 303 and this Honorable Court's interpretation of that section does not preclude Matson from seeking relief for its damages in Federal Court.

Barring Matson from relief in Federal Court leaves unions free to illegally picket and illegally coerce employers, in violation of Section 8(b)(4), into signing what is commonly referred to as Labor-Management Relations Act Section 8(f), 29 United States Code Section 158(f), Pre-Hire Collective Bargaining Agreement.

Section 8(f) Pre-Hire Collective Bargaining Agreements are only allowed in the construction and garment industries, because they are disfavored contracts entered into irrespective of the desires of the employer's workers. Only in the construction and garment industry may a union *lawfully* picket for a Collective

Bargaining Agreement without establishing that a majority of that employers employees wish to be represented by that *lawfully* picketing union.

This case should therefore not be confused with those court decisions which provide that *lawful* picketing is not grounds to rescind a Section 8(f) Pre-Hire Collective Bargaining Agreement. But this case does not involve *lawful* picketing for a highly regulated and normally disfavored Pre-Hire Contract. Local Union 66 did not picket lawfully. Instead it picketed *unlawfully* for a Pre-Hire Contract.

Local 66 did *not* picket in any effort to obtain a Collective Bargaining Agreement to enhance Matson's *own current workers* working conditions. Instead the Collective Bargaining Agreement sought by Local 66's illegal picketing was completely unsupported by Matson's workers because it required Matson to *fire* his workers and to replace them with strangers from Local 66's hiring hall.

The Labor-Management Relations Act allows *no* other industry's unions, other than those in the construction and garment industry, to even engage in *lawful* picketing to gain such Pre-Hire Collective Bargaining Agreements. The Labor-Management Relations Act allows only construction and garment unions to picket for Pre-Hire Agreements irrespective of the workers opinions, but only if that picketing is *lawful* and does not constitute a secondary boycott prohibited by Section 8(b)(4).

It is particularly ironic that the Ninth Circuit would allow in the instant case a construction union's illegal picketing to have resulted in any Collective Bargaining Agreement whatsoever.

V

ARGUMENT

A. Section 303 of the Labor-Management Relations Act Provides Relief to Persons Damaged by Illegal Secondary Boycott Picketing

It is an unfair labor practice under Section 8(b)(4) of the Labor-Management Relations Act of 1947, for a union to picket,

boycott, or otherwise "threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce," in order to force "any person to cease doing business with any other person." [29 U.S.C. § 158(b)(4)].

The Labor-Management Relations Act further provides at 29 U.S.C. Section 187 that any labor organization which engages in activity which is in violation of Section 158(b)(4) has engaged in unlawful conduct. A person "injured in his business or property by reason of any violation of Section 29 U.S.C. 187(a) has the right to come into the United States District Court and seek recovery for damages by him sustained and the cost of suit." [29 U.S.C. 187(b)].

B. A Person Has The Right To Recover Under Section 303 Damages Which Were Caused By Illegal Picketing

The Ninth Circuit, in its 1975 decision of *Mead v. Retail Clerks Int. Ass'n., etc.,* noted Section 303's derivation from the damage provisions of anti-trust statutes and held that if a defendant's act "materially contributed" to an injury, then it would be proper to find that an injury occurred " 'by reason of' particular unlawful conduct". [*Mead v. Retail Clerks Int. Ass'n., etc.* (1975) 523 F.2d 1371, 1376.]

A plaintiff must show a "causal connection" with a "reasonable probability" between the defendant's "wrongful act" and the monetary damage suffered by the plaintiff. [*Mead v. Retail Clerks Int. Ass'n., etc., supra*, 523 F.2d 1371, 1377, citing *E.V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.* (9th Cir., 1958) 252 F.2d 473, 477].

In a 1930 anti-trust case decision this Honorable Court held that "damages resulting necessarily and immediately and directly from a wrongful act are, by general rule, recoverable." [*Story Parchment Co. v. Patterson Parchment Paper Co.* (1930) 282 U.S. 555, 563, 51 S.Ct. 248, 250].

This Honorable Court has also held that when a defendant has been found to have committed a wrongful act, and there was support for a "just and reasonable inference" that plaintiff suffered damage as a result of this act, it is appropriate to award

plaintiff damages which were suffered as a result of the wrongful action. [*Bigelow v. RKO Radio Pictures* (1946) 327 U.S. 251, 266, 66 S.Ct. 574, 580].

C. Faced With The Union's Illegal Acts Which Were Causing Matson Damage, Matson's Proper Choice Was To Honor Its Duty To Mitigate Its Section 303 Damages

With Union's pickets at all three gates of the job site and the Union saying it would not leave until Matson was kicked off or until Matson signed a Union contract, Matson had three alternatives. First, Matson could have sought an injunction through the National Labor Relations Board pursuant to 29 U.S.C. Section 160(j) and 8(b)(4) under which *no monetary* damage recovery existed, and the injunction would only be against the Union, not against the General Contractor to order Matson rehired. Second, Matson could have breached its contractual agreement with PCCI and walked away and suffered hundreds of thousands of dollars worth of damages with no control over the type or amount of damages it might incur. Or finally, Matson could sign the Collective Bargaining Agreement under protest, get re-hired by PCCI and thus mitigate its damages caused by Local 66's illegal picketing.

The Union only gave Matson one way to continue to work and fulfill its contractual obligations; sign a three year. Matson took this course because: (1) under Section 303, there is a duty created to minimize or mitigate damages if there is any reasonable way to do so. [*Broadmoor Homes, Northern v. Cement Masons, Local 594* (N.D. Cal. 1961) 507 F.Supp. 55, 58; *Vulcan Materials Co. v. United States Workers of America* (5 Cir., 1970) 430 F.2d 446, 458, cert. den. 401 U.S. 464, 91 S.Ct. 974.]; and (2) if Matson continued to work its damages would be less and it could earn the majority of the benefit of the bargain it had made with PCCI.

D. The Award Of Excess Wages Paid By Matson Under The Union Contract Is Consistent With Prior Lower Courts Interpretations Of Damage Award Authority Available Under Section 303

Lower Courts have previously awarded wages to Plaintiff-Employers as a result of Defendant—Unions' illegal acts. [For example, overtime pay necessary to resume normal plant operations at the end of strike, *Mason-Rust v. Laborers' International Union, Local 42*, (8th Cir., 1970) 435 F.2d 939, 947; increased overtime premium payments to work man hours lost by different contractors of the Plaintiff, *Noranda Alum., Inc. v. United Bro. of C.S.J. Etc.* (8th Cir., 1976) 528 F.2d 1304, 1309].

E. Matson, Having Been Harmed By The Union's Illegal Picketing, Must Have A Non-Waivable Right Of Recovery Against The Union

The issue of whether Matson may seek *rescission* of the Collective Bargaining Agreement which Matson signed under protest so as to recover the resultant increase in wages as restitution damages is a matter of first impression before this Honorable Court. While it has been decided that punitive damages are not available as a remedy for violations of Section 303 [*Local 20, Teamsters, Chauffeurs and Helpers Union v. Mortin* (1964) 377 U.S. 252, 260], there has been no holding on this distinctly different rescission and restitution issue.

The purpose of Section 303 is to make it . . . "unlawful to participate in jurisdictional disputes or secondary boycotts when the result is to do damage to whoever suffers" from the unlawful act.[4]

The damage language of Section 303 was compared favorably in the Senate debates to that available under the Sherman Act. [See, 93 Cong. Rec. 4872-4873]. In anti-trust cases, there is long standing precedent that where . . . "a wrong has been done", . . . "courts find some way in which damages can be awarded."

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[4] Statement of Senator Morse, while referring to the intent of Senator Taft, see 93 Congressional Record 4871, in the Senate's debates regarding Section 303.

[*Bigelow v. RKO Radio Pictures, Inc.*, (1946) 327 U.S. 251, 266, 66 S.Ct. 574, 580, 90 L.Ed. 652, citing *Story Parchment Co. v. Patterson Parchment Paper Co.* (1931) 282 U.S. 565, 51 S.Ct. 248, 251, 75 L.Ed. 544, and *Palmer v. Connecticut Railway Co.* (1941) 311 U.S. 544, 559, 61 S.Ct. 379, 384, 86 L.Ed 336 and cases cited].

There was ample evidence in *Bigelow*, as there is here, that "petitioners were damaged by respondents" actions. [*Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. 266, 66 S.Ct. 580]. Therefore, it is within the proper parameters of Section 303 to grant relief to Matson.

CONCLUSION

For the foregoing reasons, Petitioner Matson respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari and reverse the Ninth Circuit Court of Appeals July 27, 1988, decision thereby reinstating Petitioner Matson's Section 303 Complaint for Damages against Local Union 66.

Dated: October 13, 1988.

Respectfully submitted,

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(Appendixes Follow)

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATSON PLASTERING COMPANY, INC., a California corporation,
Plaintiff-Appellant,

v.

PLASTERERS AND SHOPHANDS LOCAL NO. 66, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE U.S. AND CANADA, and unincorporated association,
Defendant-Appellee,

and

CONTRACTING PLASTERERS ASSOCIATION OF ALAMEDA COUNTY AND CONTRA COSTA COUNTY, an unincorporated association, et al.,
Defendants.

No. 87-2203
D.C. No.
CV-86-5962-WWS
OPINION

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
April 13, 1988—San Francisco, California

Filed July 27, 1988

Before: Alfred T. Goodwin, Mary M. Schroeder and
Cecil F. Poole, Circuit Judges.
Opinion by Judge Schroeder

COUNSEL

Thomas E. Campagne and Brian C. Leighton, Fresno, California, for the plaintiff-appellant.

John Davis, Jr., McCarthy, Johnson & Miller, San Francisco, California, for the defendant-appellee.

OPINION

SCHROEDER, Circuit Judge:

Matson Plastering Company, Inc. ("Matson"), appeals the district court's grant of summary judgment to the Plasterers and Shophands Local No. 66 ("Union"). Matson brought this action under section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, alleging it had been compelled to sign a collective bargaining agreement with the Union as a result of the Union's illegal secondary picketing. Matson sought rescission of the agreement as well as damages. We affirm the district court's judgment.

This case arises out of a construction site dispute between Matson and the Union. Matson is a plastering contractor in Northern California; its president is Kenneth Matson. The Union represents plasterers in Northern California.

In September 1985, Peoples Construction Company, Inc. ("PCCI"), a subcontractor for a construction project in Foster City, California, hired Matson as a plastering sub-subcontractor for that project. PCCI's labor agreements required that it hire only union subcontractors, and the proj-

ect was within Local 66's jurisdiction. However, Matson was operating non-union.

In October 1985, a spokesman for the Union approached Matson about signing a labor agreement; Matson refused. Matson alleges that the Union then threatened PCCI that it would "shut down the whole job" at the Foster City construction site unless Matson signed a collective bargaining agreement with the Union or was fired from the job. The Union denies this allegation.

For several days in late October, the Union picketed the construction site. Whether this was lawful organizational picketing or unlawful secondary picketing is also disputed. In any event, the picketing stopped when Matson agreed to sign a collective bargaining agreement with the Union. Matson signed a three-year agreement with the Union, and completed its work at the site under the terms of that agreement.

In March 1987, Matson sued the Union in district court, alleging that it was compelled to enter into a collective bargaining agreement as a result of the Union's illegal secondary picketing. Matson alleged that the Union's picketing was illegal secondary activity in violation of section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), because it was intended to induce other contractors at the site to stop doing business with Matson. The Union maintained its activities were legal primary picketing under 29 U.S.C. § 157, not directed at neutral parties. Matson brought this action under section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, seeking rescission of the collective bargaining agreement, recovery of what it terms are "excess wages" paid under the agreement, and damages for alleged lost opportunities to bid on other projects.

In May 1987, the district court granted summary judgment to the Union on all claims. The court ruled that even assuming Matson's allegations of illegal secondary picketing were

true, the remedies it sought were not available as a matter of law under section 303. Matson timely appeals pursuant to 28 U.S.C. § 1291. The issue is whether Matson has a claim justiciable in district court for the relief it seeks.

Matson contends it is entitled to rescission of the collective bargaining agreement under section 303 because it signed the agreement "under duress and/or as a result of unlawful picketing." Section 303 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187. The unfair labor practices defined in section 158(b)(4) include threatening or coercing an employer for the purpose of forcing the employer to join a labor organization, or striking for the same purpose. 29 U.S.C. § 158(b)(4).

The problem with Matson's position is that it seeks equitable relief to undo the contract it signed, but section 303's remedies are limited to damages. Matson could have asked the National Labor Relations Board to enjoin the Union's allegedly illegal secondary picketing. *See* 29 U.S.C. § 160(j)(Board has power to petition district court for injunctive relief against unfair labor practice). However, Matson did not timely seek action from the Board. Instead, Matson brought this action under section 303, and asks us to declare its collective bargaining agreement invalid.

Section 303 authorizes only "actual, compensatory damages." *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252, 260 (1964). Thus, even if the Union's activity constituted illegal secondary picketing, the federal courts cannot grant the relief Matson seeks. Because section 303 clearly limits relief to damages, the district court properly rejected Matson's request for rescission.

Matson next contends it is entitled to the "excess wages" it paid its workers as compensatory damages under section 303. Specifically, Matson argues that, as a result of the Union's illegal secondary activity, it was forced to enter into a collective bargaining agreement with the Union, and that under the terms of that agreement, it paid its workers higher wages than it otherwise would have paid them. Matson concedes that no term or clause of the agreement is harsh or unconscionable. Matson argues, nonetheless, that because the agreement was procured by illegal secondary picketing, it is entitled to recover the "excess wages" it paid as damages under section 303.

No court has ever held that damages for such "excess wages" are recoverable under section 303. The types of damages courts have recognized as recoverable under section 303 include: sales lost during a union's illegal picketing, *Frito Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 623 F.2d 1354, 1363 (9th Cir.), *cert. denied*, 449 U.S. 1013 (1980); the cost of extra guards hired as a result of picketing, *Flame Coal Co. v. United Mine Workers*, 303 F.2d 39, 46 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); overtime pay necessary to resume normal plant operations at the end of the strike, *Mason-Rust v. Laborers' International Union, Local 42*, 435 F.2d 939, 947 (8th Cir. 1970); travel expenses and long-distance telephone calls incurred in attempting to end the strike, *Abbott v. Local 142, Journeymen & Apprentices of the Pipe Fitting Industry*, 429 F.2d 786, 790 (5th Cir. 1970); and extra freight expenses, *Vulcan Materials Co. v. United Steel-*

workers, 316 F. Supp. 509, 515 (N.D. Ala. 1969), *aff'd*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

The language of the statute, its legislative history, and judicial interpretation make clear that damages recoverable under section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties as a result of the picketing, but do not include wages paid to employees pursuant to a contract. *See Morton*, 377 U.S. at 260. Other forms of relief are available by filing a complaint with the National Labor Relations Board, which has broad remedial powers. *See* 29 U.S.C. § 160. Matson seeks an order that would ignore the parties' written agreement as to wages and benefits. Matson is clearly not entitled to rescission under section 303; it cannot nullify the entire agreement by recasting its claim as one for damages.

Finally, Matson argues that under section 303 it is entitled to recover lost profits resulting from its lost opportunity to bid on subsequent contracts. However, it is an elementary principle of contract law that damages must be reasonably certain. *See Restatement (Second) of Contracts* § 352 (1981); *see also* 22 Am. Jur. 2d *Damages* § 172 (1965)("[n]o recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative"). This case is not like *Frito Lay*, in which we found lost profits recoverable because we could ascertain the damages suffered with reasonable certainty. In *Frito Lay*, we awarded damages for sales lost due to a strike by comparing the sales volume in the division affected by the strike with two other divisions in the same state that promoted the same items at the same time and had approximately the same absolute sales volume figures for the four periods preceding the strike. 623 F.2d at 1364. We have never awarded damages for lost opportunities to bid on construction projects. The two courts that have considered the issue of lost profits resulting from the lost opportunity to bid on subsequent contracts have found proof of damages too speculative and uncertain. *Collier v. Hoisting*

and Portable Engineers, Local Union No. 101, 761 F.2d 600 (10th Cir. 1985); *Hyatt Chalet Motels, Inc. v. Salem Building and Construction Trades Council,* 298 F. Supp. 699 (D. Ore. 1968).

Because Matson did not bid on these subsequent contracts, we hold that any damages resulting from its lost opportunities are not available under section 303. Hence, we find that each of Matson's contentions on appeal is without merit.

AFFIRMED.

Appendix B

United States District Court

Northern District of California

No. C-86-5962-WWS

Matson Plastering Company, Inc.,
a California Corporation,
Plaintiff,

v.

Plasterers and Shophands Local No. 66,
O.P. & C.M.I.A., an unincorporated association,
Defendant.

ORDER

[Filed May 8, 1987]

Plaintiff Matson Plastering Co. alleges that it was compelled to enter into a collective bargaining agreement as a result of defendant's illegal secondary picketing. Plaintiff brought this action under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 157, seeking rescission of the collective bargaining agreement and recovery of "excess" wages paid under the agreement. Plaintiff also seeks damages for contracts plaintiff allegedly did not obtain either because, as a result of the illegal strike, it was a union employer or because after the strike it was perceived by other contractors as having "labor troubles."

These remedies are not available under § 303. Section 303 authorizes the recovery of damages resulting directly from illegal secondary activity such as sales lost while picketing was proceeding, *see Frito Lay, Inc. v. Local Union No. 137, IBEW*, 623 F.2d 1354, 1363 (9th Cir. 1980), and overtime pay necessary to the resumption of normal plant operations at the end of an illegal work stoppage, *id.* at 1365 n. 11. Plaintiff cites no case where excess wages paid under a collective bargaining agreement entered into as a result of prohibited activity or the other relief plaintiff seeks have been awarded; the Court is aware of none; and it seems inconceivable that relief so inconsistent with the policies underlying the labor laws would be available.

One court has held that in the absence of proof of compensatory damages, a district court may award nominal damages under § 303. *Iodice v. Calabrese*, 409 F. Supp. 389, 393 (S.D.N.Y. 1970). The statute, however, limits recovery to those showing injury to business or property. Moreover, the Supreme Court has held that punitive damages are not recoverable under § 8(b)(4)(B) because Congress limited recovery to actual, compensatory damages. *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964). Proof of actual damages is therefore a necessary element of any action under § 8(b)(4)(B). Since Matson Plastering has failed as a matter of law to establish recoverable damages, summary judgment in favor of defendant is granted.

IT IS SO ORDERED.

DATED: May 8, 1987

/s/ WILLIAM W. SCHWARZER
WILLIAM W. SCHWARZER
United States District Judge

JUDGMENT IN A CIVIL CASE

United States District Court

Northern District of California

C-86-5962-WWS

[Filed May 11, 1987]

Name of Judge or Magistrate—William W. Schwarzer

Matson Plastering Company,

Plaintiff,

v.

Plasterers and Shophands Local No. 66, O.P. & C.M.I.A.,

Defendant.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court having considered the pleadings and the matter having been duly submitted;

It Is Hereby Ordered and Adjudged that:

1. Defendant's motion for summary judgment is granted.

2. Summary judgment in favor of the defendant and against the plaintiff shall be entered accordingly.

3. The parties shall bear their own costs.

Entered in Civil Docket May 11, 1987

Appendix C

In the United States District Court

for the Northern District of California

Before the Honorable William W. Schwarzer, Judge

No. C86-5962WWS
Friday, May 8, 1987
San Francisco, California

Matson Plastering Company, Inc., a California Corporation

Plaintiff,

v.

Contracting Plasterers Association of Alameda County and Contra Costa County, an Unincorporated Association, Lathing and Plastering Contractors of San Francisco and San Mateo Counties, an Unincorporated Association, and Plasterers and Shophands Local 66 O.P. & C.N.I.A., an Unincorporated Association,

Defendants.

Reporter's Transcript

For Plaintiff:	Brian C. Leighton, Esquire Thomas E. Campagne, A Professional Corporation Airport Officer Center 5108 E. Clinton Way, Suite 122 Fresno, California 93727
For Defendants, Local 66 O.P. & C.N.I.A.	John J. Davis, Jr., Esquire McCarthy, Johnson & Miller 22 Second Street, Seventh Floor San Francisco, California 94105
Reported By:	Tonia L. Webb, C.S.R.

(Friday, May 8, 1987) (11:15 A.M.)

PROCEEDINGS

The Clerk: Calling Civil Action Number 86-5962, Matson Plastering Company versus Plasterers Association.

Will counsel come forward and state their appearances.

Mr. Davis: Good morning, Your Honor.

John J. Davis, Junior, of McCarthy, Johnson & Miller for the Defendant and Moving Party, Plasterers Local Union Number 62.

Mr. Leighton: Brian C. Leighton on behalf of Plaintiffs, Matson Plastering Corporation.

The Court: We discussed this very issue at the Status Conference, as I recall, and I expressed my view at that time, that it was difficult for me to see how, consistent with the policies of the Federal Labor Laws, you could allow an employer to recover damages which consists of the additional costs incurred, because he entered into a collective bargaining agreement.

Now, that issue was out on the table. And I said that it was hard for me to see how that kind of recovery could ever be allowed.

I am assuming that you had lots of time to go out and to see if there's any law on this point.

There doesn't seem to be any law, one way or the other. And I'm going to issue an order in this case that says that, in effect, that that kind of recovery is not permissible, that where Section 303 permits the recovery of damages, what it has in mind is a situation where, as a result of *Illegal* picketing, somebody is prevented from performing a contract and suffers a loss of damages.

But if the picketing coerces somebody into entering a labor agreement, it's the national policy favors the organization of employees and the making of labor contracts.

And I can't imagine any way in the world that any federal court is going to say: Well, because you were forced to do that through *Illegal* conduct, therefore, we're going to make the union compensate you for the additional compensation you have to pay under the contract, or the contracts you lost because people did not want to deal with you because you organized or had labor problems.

I just think it's a plain matter of enforcing the policy, or at least not doing something which is contrary to the underlying policy of the labor law.

So I'm going to grant the motion for summary judgment, just on the ground that there are no compensable damages.

It is true the Union (sic-Employer) could recover nominal damages; but in this case, there is no injury shown, so there isn't any basis for doing that.

So that's the view I take of this. And perhaps we should publish this ruling so that there's something on the books on this issue.

But there is nothing really—no law to be cited. There isn't anything on this. But it seems to me to be self-evident.

Now, perhaps you want to—if you thought about this, counsel, you may want to respond to it. Because that is my view of it.

Mr. Leighton: Yes, your honor. It appears as though the courts have really not restricted the types of damages that are recoverable under 303 action.

We are dealing here with the primary employee—the primary employer who was the subject of the illegal picketing, now who has brought suit.

Matson had two choices at the time that he was kicked off the job site.

I believe what the court is saying, then, is if Matson, after being kicked off the job site, refused to bargain with the union and, thus, remained kicked off the job site, he could go after the union and recover damages under 303 for loss of the profit on that particular job, because he's now kicked off.

But, because he's, as a result of the illegal activity, signed the contract, he can't recover any damages.

The Court: That's correct.

Mr. Leighton: I don't believe that the law can hold that Matson, as a result of illegal secondary picketing, is forced to exercise—in order to recover any damages, is forced to exercise only one alternative, and that is to remain kicked off the job.

The Court: Well, of course, one answer to that is the National Labor Relations Act and the Labor Management Act established a procedure by which an employer who is subjected to illegal picketing of that sort can obtain a quick remedy through the National Labor Relations Board, through the administrative remedy.

And that's probably one of the reasons for doing it; because damages can't adequately compensate one for that kind of a disruption of one's business activities.

So the board is there to give the relief, get an injunction in court and—

Mr. Leighton: Is—

The Court: —and that is the way in which an employer would deal with that situation.

Mr. Leighton: Your honor, is the court—has the court reached its determination as to whether or not there is illegal secondary picketing in the first instance?

The Court: Well, I'm assuming that, for present purposes.

Mr. Leighton: Okay.

The Court: I guess you could argue about it, but I think it's too complex to get into it.

Mr. Leighton: Okay.

The Court: And I don't see any need to do it. It's awful hard to sort out what really happened in the confusion of those gates.

Mr. Leighton: Is the court assuming, then, for purposes of its ruling, that Matson could prove, or at least have made a prima

facie showing of proof, that there were increased wages as a direct result of having to sign the union contracts?

Just for purposes of preserving this issue on appeal.

The Court: Well, the ruling will speak for itself.

It will simply say that you cannot recover, assuming there was *Illegal* secondary picketing, you cannot recover those losses which you suffered as a result of entering into collective bargaining agreement. That's what I am saying.

Because I do not think, as a matter of national policy, a federal court should permit that measure of damages. That's all that I am saying.

So I am assuming, yes, that there was illegal picketing, for purposes of the ruling.

Mr. Leighton: Okay. Your Honor, because of the fact that there is absolutely no case law on this subject—

The Court: There may be a reason for that, because nobody heretofore has thought that that is even—

Mr. Leighton: It is clear—

The Court: —conceivable theory.

Mr. Davis: May I address that point, your Honor?

Mr. Leighton: It is clear from the cases, that in the majority of instances, it's a secondary—or the neutral employers who have brought suit.

That issue would be different in that instance. I only address this issue as a result of the union's request for Rule 11 sanctions.

The fact of the matter is that there's absolutely no cases—

The Court: I am not going to impose any sanctions.

Mr. Leighton: Excuse me?

The Court: I am not imposing sanctions.

Mr. Leighton: He has moved for that, and that's why—

The Court: Well, I'm not going to impose sanctions.

I mean, this is a legitimate point. I think counsel can argue for the extension or modification of existing law.

I do not see anything improper here in doing that. I mean, you know, I don't believe that Rule 11 properly applied would stifle advocacy.

But if I impose sanctions here for counsel advocating a novel theory, that certainly would tend to stifle creativity and initiative, and I wouldn't want to do that.

Mr. Davis: Would the court permit us to make a motion for award of fees under the bad faith exceptions?

The Court: Where is the bad faith in this case?

Mr. Davis: Well, I think the primary motiviation for this lawsuit is vexation, and I think it's a frivolous lawsuit, just because I don't think that Matson has shown a serious reason for bringing what is, in most cases, a very serious lawsuit, a 303 action.

We have a small local labor union that's been forced into some fairly substantial briefing, and the expense of that, and we're not talking about the AFL-CIO, or International Union.

We're talking about a very small organization that has had to devote substantial resources to an esoteric problem that we think should have been analyzed and passed by the boards by counsel before filing the lawsuit.

The Court: Well, but counsel could legitimately tell his client: "There is no case that's ever passed on this point and there's no case against us."

How can I impose sanctions on the basis of his assertion of a proposition that's not been refuted by any case?

And I wouldn't be confident that every other judge would necessarily reach the same conclusion that I do, although I think it's right.

I think you're fortunate in having my—in my having focused on this very quickly, so I saved you a lot of money by getting the issue up front and getting it decided quickly.

Somewhere else, you probably would have had to go through a trial first. I'm not going to permit motion for sanctions in this case.

Mr. Davis: Well, I was really speaking more in the context of a motion for an award of attorney's fees, not under the rule, but under the bad faith—

The Court: That's a fortiori. I don't think there's bad faith here.

There's an awful lot of labor litigation in this court that is really part of the rough and tumble of the bargaining process, and people continue their economic struggles in the courts, and we all know that the courts are used for that purpose.

So you have to be a little flexible about it and acknowledge that some of the fighting that goes on here is part of the economic battle that goes on outside.

Now, I've drawn some lines, as you know, on this. I don't think that you can carry that too far and use the court to harass an opponent.

But in this case, it seems to me that I would be going off to the reverse if I considered Rule 11 sanctions, or a fortiori, bad faith sanctions.

So, I appreciate your point, but—

Mr. Leighton: Your Honor, could I make one other point (sic.?)

The Court: Yes.

Mr. Leighton: The court has ruled that these types of damages are not recoverable in this type of action.

In Matson's complaint, he has also requested rescission of the contract, based on the fact that it was entered into as a direct result of illegal activity on behalf of the Union.

I believe that that still is a viable issue. The Union—

The Court: I am ruling the same way on that. I am not—I am rejecting—any relief.

You know, you'd have a right to get rescission if you proved that your man entered the contract because the Union organizer had a gun against his head, or something like that, traditional coersion.

But short of traditional coersion, I would not—I would not entertain that belief (sic. relief).

So the ruling will be broad enough to cover both dangers, your argument that it as (sic. was) done as a result of an illegal activity; but, I think it would undermine labor relations, under the act, contrary to national policy, if I allowed that.

The remedy is before the National Labor Relations Board on—on an unfair labor practice charge.

Mr. Leighton: Is the court going to issue a written ruling—

The Court: Yes.

Mr. Leighton: —or is this the court's order as of today?

The Court: No, I am going to issue a written order.

Mr. Leighton: Thank you. I assume the time for appeal, then, would come as a result of the written ruling as opposed to from today.

The Court: I will let you be the judge of that.

Mr. Leighton: Okay. Thank you, Your Honor.

The Court: But, you know, there won't be much difference. You will have it on Monday, I think.

Thank you, counsel.

Mr. Leighton: Thank you, Your Honor.

Mr. Davis: Thank you, Your Honor.

(Whereupon, the above proceedings were adjourned at 11:25 a.m.)

Appendix D

Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187.

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

(June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 704(e), 73 Stat. 545.)

---

[1] So in original. Probably should be "of".

Appendix E

Section 8(b)(4) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(4)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

. . . . .

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where

not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MATSON PLASTERING, INC., a California corporation,
Petitioner,

v.

PLASTERERS AND SHOPHANDS LOCAL NO. 66,
O.P. & C.M.I.A., AFL-CIO, an unincorporated association,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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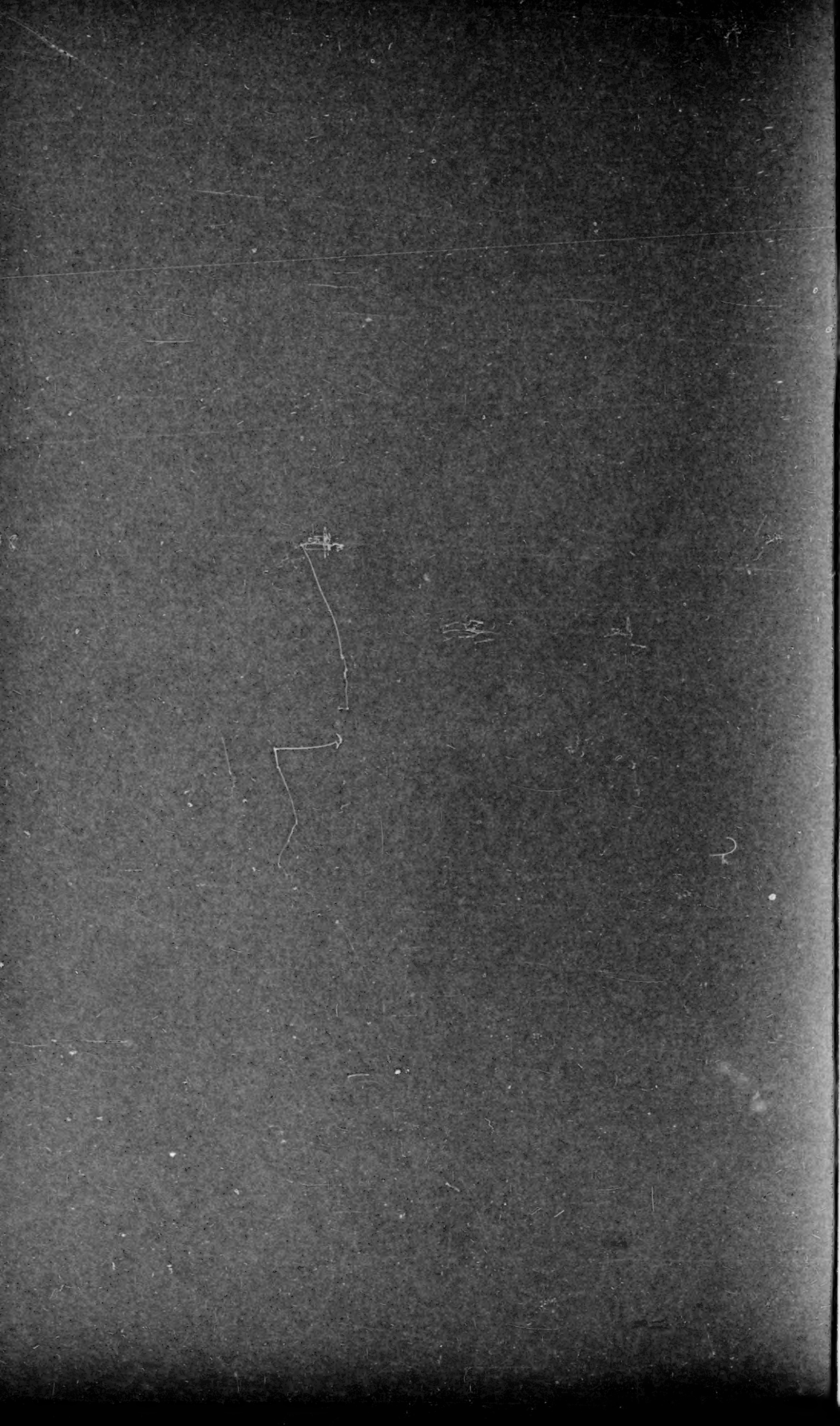

QUESTION PRESENTED

As set forth in the petition, the first two questions assertedly involve waiver of the Section 303 right of action and "loss" of federal jurisdiction. Neither question was presented to or considered by the courts below. Rather, the questions presented and decided below were:

> 1. Is rescission of a collective bargaining agreement available as a remedy in an action brought funder Section 303 of the Labor-Management Relations Act [29 U.S.C. § 187], where the plaintiff alleges that it signed the agreement under the duress of allegedly unlawful secondary conduct?
>
> 2. May a Section 303 plaintiff, after signing a collective bargaining agreement, recover as damages either the wage increase it paid under the agreement or the profits it allegedly lost on future bidding opportunities as a result of losing its non-union status?

Of these, it appears that petitioner Matson Plastering Co. has chosen to present to this Court only the question of the recoverability of the wage increase it paid under the agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-690

MATSON PLASTERING, INC., a California corporation,
Petitioner,

v.

PLASTERERS AND SHOPHANDS LOCAL NO. 66,
O.P. & C.M.I.A., AFL-CIO, an unincorporated association,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The court of appeal's decision herein is reported at 852 F.2d 1200. The district court's decision is reported at 658 F.Supp. 1580.

STATEMENT OF THE CASE

This action was brought under Section 303 of the Labor-Management Relations Act [29 U.S.C. § 187]. It arises from a construction industry labor dispute in which respondent Plasterers Local 66 [1] secured bargain-

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[1] Respondent Plasterers and Shophands Local Union No. 66 is an affiliate of the Operative Plasterers and Cement Masons International Association, AFL-CIO.

ing authorizations from three of the four plasterers employed by petitioner Matson Plastering Co. ("Matson"). When the company refused to recognize and bargain with the Union, Local 66 picketed Matson at the company's jobsite and Matson's plasterers stopped work.

The general contractor designated a reserved gate for Matson's use, but Matson's personnel used all three of the jobsite entrances. Upon observing this use, the Union picketed those three entrances.

The general contractor responded by instructing Matson to remain off the job pending resolution of the matter. The Union stopped picketing. A few hours later Matson reached agreement with the Union and signed the Union's areawide Master Labor Agreement.

The picketing did not cause any work stoppage by any employees of neutral employers.

In the courts below, Matson sought rescission of its collective bargaining agreement and two types of money damages: the difference between the higher wages it paid under the collective bargaining agreement and the wages it had paid before, and the profits it assertedly lost by not being able to bid on future construction projects due to its union signatory status.

The district court granted summary judgment to Local 66 on the grounds that as a matter of law, none of the relief sought by Matson was available under Section 303. The court of appeals affirmed.

The instant petition presents only the question whether the wage differential should be recoverable if Matson could prove a violation of Section 303.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION ADVANCES NO REASONS WHY THE WRIT SHOULD BE GRANTED.

Supreme Court Rule 21.1(j) requires that a petition for certiorari contain, *inter alia*, "[a] direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17." Rule 17.1 describes the principal reasons for discretionary review of a decision of a federal court of appeals as follows:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition argues none of these reasons. In fact, it argues no particular reason why this case deserves the Court's attention. Since it has argued no reason for the exercise of the Court's discretion, the petition should be denied.

II. THERE ARE NO REASONS WHY THE WRIT SHOULD BE GRANTED.

A. The Court Of Appeals' Decision Does Not Conflict With Any Other Court's Decision.

Neither the parties nor the courts below have been able to find any reported decision, official or otherwise, treating the question whether a wage differential like the one in issue here can be recovered under Section 303. Therefore there is no conflict of decisions for the Court to resolve.

B. This Case Does Not Present Questions So Important As To Warrant The Court's Attention.

Section 303 was enacted in 1947 as part of the Taft-Hartley Act [29 U.S.C. §§ 141, *et seq.*]. In forty years of litigation under Section 303, the instant question has not arisen in any case unearthed by the parties or the courts below. This fact alone demonstrates that the question presented is not so important as to merit the Court's attention.

C. The Court Of Appeals' Decision Was Perfectly Sound.

Guided by this Court's decision in *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260 (1964), and after reviewing the decisions of other courts of appeals, the Ninth Circuit found that

> The language of the statute, its legislative history, and judicial interpretation make clear that damages recoverable under section 303 include actual compensatory damages for out-of-pocket expenses paid to third parties as a result of the picketing, but do not include wages paid to employees pursuant to a contract. See Morton, 377 U.S. at 260, 84 S.Ct. at 1258. Other forms of relief are available by filing a complaint with the National Labor Relations

> Board, which has broad remedial powers. See 29 U.S.C. § 160. Matson seeks an order that would ignore the parties' written agreement as to wages and benefits. Matson is clearly not entitled to rescission under section 303; it cannot nullify the entire agreement by recasting its claim as one for damages.

Petition, Appendix A, p. A-6, 852 F.2d 1200, 1203.

The district court was even more succinct, saying that "it seems inconceivable that relief so inconsistent with the policies underlying the labor laws would be available." Petition, Appendix A, p. A-8, 658 F.Supp. 1580.

Respondent Local 66's own approach has been to follow the Ninth Circuit's sound practice of relying on Prosser, *Torts*, 4th Ed. in analyzing causation questions under Section 303. *Mead v. Retail Clerks Local 839*, 523 F.2d 1371, 1379 (9th Cir. 1975), *Frito-Lay, Inc. v. Teamsters Local 137*, 623 F.2d 1354, 1362-1363 (9th Cir. 1980), *Rainbow Tours v. Hawaii Joint Council*, 704 F.2d 1443, 1448 (9th Cir. 1983).

Dean Prosser gives helpful guidance on the instant question:

> It is quite possible, and often helpful, to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?

Prosser, *Torts*, 4th Ed., p. 244

Here the answer is resoundingly in the negative, for the "event" was Matson's signing of the Master Labor Agreement and becoming obligated to pay its plasterers the Agreement's wage rates.

Local 66's duty as a majority bargaining representative was to obtain for Matson's plasterers the best wages and fringe benefits it could reasonably demand: the area standards of the Master Labor Agreement. It had no

duty to protect the employer against the event of becoming signatory. Moreover, an asserted duty to protect the employer from paying higher wages would conflict irreconcilably with the Union's duty to represent the employees.

Under any or all of these approaches, it is plain that the courts below reached the correct result. There is no reason to disturb it.

CONCLUSION

Petitioner offers no reasons why its request for review should be granted. Indeed, there are none.

Respondent respectfully submits that the petition should be denied.

Respectfully submitted,

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Dated: November 23, 1988